

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA ANN D'ITRI,

Plaintiff-Appellant,

v

TY MARTIN BOLLINGER,

Defendant-Appellee.

UNPUBLISHED

November 22, 2011

No. 303472

Ingham Circuit Court

LC No. 08-004088-DC

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Plaintiff-mother appeals as of right the trial court's order granting defendant-father's motion to dismiss plaintiff's motion to change custody. We affirm.

The parties, who were never married, are the parents of SB, born December 2, 2002. After the parties separated, a stipulated order was entered awarding joint legal custody of the minor child to both parties, but granting primary physical custody of the minor child to defendant-father.

Less than a year later, plaintiff-mother moved for a change of custody, citing the minor child's desire to live with her and alleging that defendant-father and his wife had a contentious marriage. Defendant-father's response to the motion denied that his marital relationship was acrimonious. The matter was referred to a conciliator, who recommended defendant-father retain primary physical custody, noting that plaintiff-mother had failed to provide any evidence to support her allegations.

Plaintiff-mother objected to the conciliator's recommendation. Plaintiff-mother also hired a private investigator to look into the background of defendant-father's new spouse. As a result, plaintiff-mother learned that the new spouse had been arrested in 1990 for suspicion of child sexual abuse involving her daughter. The charges were later dismissed at the preliminary examination for lack of evidence. Plaintiff-mother amended her motion to change custody to include information related to the new spouse's past. Defendant-father moved to dismiss

plaintiff-mother's motion for change of custody,¹ arguing that she had failed to meet her burden to establish proper cause or change in circumstances sufficient to warrant a reevaluation of the custody order. Following a hearing, the trial court concluded that plaintiff-mother had failed to meet her burden and granted defendant-father's motion to dismiss.

Plaintiff-mother now challenges the trial court's dismissal of her motion for change of custody. We review a trial court's determination of whether a moving party has demonstrated proper cause or a change in circumstances under the great weight of the evidence standard. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 902 (2009). Under this standard, we defer to the trial court's findings unless they "clearly preponderate in the opposite direction." *Id.*

A trial court has the power to modify custody. However, unwarranted and disruptive changes in custody should be avoided. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001). To that end, a party requesting a change in the established custodial environment must, as a threshold matter, demonstrate either proper cause or a change in circumstances sufficient to warrant a change before a trial court may order such a change. *Killingbeck v Killingbeck*, 269 Mich App 132, 146; 711 NW2d 759 (2005); *Foskett*, 247 Mich App at 6, citing MCL 722.27(1)(c). This Court defined the meaning of "proper cause" in the context of child custody as "one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003).

Plaintiff-mother first argues that the trial court erred when it limited its consideration of plaintiff's claim (that proper cause existed to warrant a review of the custody order) to only those facts that had existed since the entry of the last custody order. Specifically, plaintiff-mother asserts the trial court completely disregarded her concerns related to the discovery that defendant-father's wife had been arrested for suspicion of child sexual abuse in 1990.

Plaintiff-mother is correct that the limitation on establishing a change in circumstance to only those facts that have occurred since the entry of the last custody order is not always applicable to demonstrate proper cause because "proper cause is geared more toward the significance" of the facts presented to support a request for a change in custody. *Id.* at 514-515. Nevertheless, this general rule will control in most cases, even where the movant is attempting to establish proper cause rather than change of circumstance. *Id.* at 515.

Here, however, our review of the record assures us that the trial court finding that plaintiff-mother had failed to meet her burden to establish proper cause was not based on the timing of the factual allegations, but instead was based on plaintiff-mother's failure to demonstrate the facts alleged were of a sufficient "magnitude to have a significant effect on the child's well-being." *Id.* at 512. The trial court specifically noted that the charges against the stepmother had been dismissed and did not lead to a conviction. In addition, in making its ruling on the record, the trial court stated that plaintiff-mother's reliance on the decades-old arrest was

¹ A motion to dismiss is not the proper vehicle for responding to a motion to change custody. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 504 n 6; 675 NW2d 847 (2003).

not sufficient by itself to demonstrate the minor child in the instant case was in any danger in defendant-father's home. After reviewing the record presented, we find that the trial court's decision was not against the great weight of the evidence.

Notably, plaintiff-mother candidly concedes that there is no indication of current abuse toward SB, but that her request for a change in custody is to prevent anticipatory harm. We recognize that it is not necessary to "await some negative effect on a child" before a custody order may be reevaluated. *Id.* at 511 n 10. Yet, the *Vodvarka* Court also made clear that a parent should not attempt to change custody by "speculat[ing] about facts that may arise in the future." *Id.* Plaintiff-mother's concerns about possible anticipatory harm based on a decades-old arrest that was later dismissed for lack of evidence can be readily characterized as this kind of speculation.

We find unpersuasive plaintiff-mother's argument that the mere fact that the arrest had occurred should be sufficient to establish criminality and, therefore, considered sufficient to establish proper cause to consider a change in custody. Plaintiff-mother relies on standards used in child protective proceedings, yet provides no citation to authority to support her argument that the same standards should be used in child custody matters. Moreover, plaintiff-mother's position that a lesser standard for establishing proper cause should be used here is inconsistent with the recognized goal of avoiding unwarranted and disruptive changes in custody. *Foskett*, 247 Mich App at 6.

We further reject plaintiff-mother's argument concerning whether the trial court improperly faulted her for failing to earlier discover the fact that defendant-father's new wife had been previously arrested for suspicion of child criminal sexual conduct. Plaintiff-mother simply mischaracterizes the rationale for the trial court's decision.

We also reject plaintiff-mother's claim that the trial court improperly refused to allow her to rely on hearsay statements from the minor child related to defendant-father's home life. We review a trial court's decision related to the admissibility of evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

Hearsay is an unsworn, out-of-court statement, which is offered to demonstrate the truth of the matter asserted. MRE 801(c). Hearsay is generally inadmissible unless it falls under one of the recognized exceptions. MRE 802. Plaintiff-mother does not assert that the minor child's statements would have qualified under a hearsay exception. Instead, she argues the proposed evidence should have been allowed under the "or otherwise" language of MCR 3.210(C)(8).² However, plaintiff-mother's reliance on MCR 3.973(E) to support this position is misplaced. While MCR 3.973(E) authorizes a trial court to consider all relevant and material evidence, to the extent that it is probative, including evidence that would otherwise be inadmissible as

² MCR 3.210(C)(8) states, "In deciding whether an evidentiary hearing necessary with regard to a post judgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion."

hearsay, MCR 3.973(E) is only applicable to child protective matters. Plaintiff-mother has provided no citation to authority that would expand this rule to child custody matters, and we decline to do so.

Finally, we reject plaintiff-mother's final argument that the trial court should have considered allegations that had been made by each parent against the other parent to determine if proper cause or a change in circumstance existed. It is well settled that the moving party requesting a change in custody has the burden of proof to establish that proper cause or a change in circumstance exists. *Vodvarka*, 259 Mich App at 509. Thus, it was plaintiff-mother's responsibility to bring forth sufficient evidence to meet this burden. This obligation would be undermined if a party were allowed to bolster his or her position by pointing to allegations made by the opposing party. Moreover, defendant-father's allegations related to plaintiff-mother's conduct and home environment were not raised for the purpose of arguing that the custody order should be reconsidered.

Affirmed. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Douglas B. Shapiro
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray